

This Opinion is Not a
Precedent of the TTAB

Mailed: June 23, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board
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In re Architectural Mailboxes, LLC
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Serial No. 90581763
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Maureen Beacom Gorman of MB Gorman Law LLC,
for Architectural Mailboxes, LLC.

Andrea Hack, Trademark Examining Attorney, Law Office 108,
Kathryn Coward, Managing Attorney.

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Before Cataldo, Greenbaum and Hudis,
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Architectural Mailboxes, LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark BILT for “non-metal mailboxes, excluding office products” in International Class 20.¹

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the goods identified in the Application, so resembles the standard character mark

¹ Application Serial No. 90581763 was filed on March 16, 2021, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

BUILT TO INSPIRE, registered on the Principal Register for “office furniture, namely, lecterns; table dividers; non-metal mailboxes; cabinets, and storage cabinets, furniture cabinets; tack boards; display boards; track systems consisting of tracks and rollers for cabinet drawers, being parts of cabinets,” in International Class 20,² as to be likely to cause confusion, mistake, or deception.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. The appeal is fully briefed. We affirm the refusal to register.

I. Likelihood of Confusion: Applicable Law and Analysis

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “DuPont” factors) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record bearing on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods

² Registration No. 5444029 was issued on April 10, 2018. The registration also recites goods in International Classes 12, 16 and 27, but these goods were not the basis for the Examining Attorney’s refusal and are not part of the present appeal.

and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We have considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source, and to protect registrants from damage caused by registration of marks and goods or services that are likely to cause confusion. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

A. The Similarity or Dissimilarity of the Respective Goods, Channels of Trade and Prospective Consumers

1. Goods

We first turn to a comparison of the goods at issue, the second *DuPont* factor, *DuPont*, 177 USPQ at 567. In making our determination regarding the similarity of the goods, we must look to the goods as identified in the appealed Application and the

cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which the sales of goods are directed.”)); *see also Paula Payne Prods. Co. v. Johnson Publ’g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) (“Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of goods.”).

Here, the relevant goods identified in the cited Registration are “non-metal mailboxes.” The Application on appeal identifies “non-metal mailboxes, excluding office products” as the goods for which registration is sought. The Registration uses broad wording to describe the identified mailboxes, the only limitation being that they are not made of metal. Registrant’s non-metal mailboxes thus encompass all non-metal mailboxes, including those that are not made for office use (as described by the narrower identification goods in the Application). *See Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at *44 (TTAB 2022); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018).

When an applicant’s goods are fully encompassed within the wording of the cited registration, they are legally identical. *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648

F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). Relatedness between the respective goods can be found based on the descriptions in the application and registration without resort to additional evidence. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) (“While additional evidence, such as whether a single company sells the goods ... of both parties, if presented, is relevant to a relatedness analysis ..., the important evidence already before [the Board comprises the identifications of goods in] the ... application and [cited] registrations.”). That is the situation we have here. Thus, where the respective goods are legally identical, Applicant’s argument that the Examining Attorney was required to make of record additional evidence showing the relatedness of the goods³ is without merit.

The legally identical nature of the respective goods heavily weighs in favor of a finding that confusion is likely.

2. Channels of Trade and Potential Customers

The third *DuPont* factor “considers ‘[t]he similarity or dissimilarity of established, likely-to-continue trade channels.’” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities and means (e.g., print, media, store aisles or shelves, or online) by which the respective goods are marketed, *see In re Majestic Distilling*, 65 USPQ2d at 1204, sold or distributed in relative proximity, *see Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

³ Applicant’s Brief, 6 TTABVUE 9-11.

Where, as here, “the goods at issue are [legally] identical ..., absent restrictions in the application and registration [and with respect to the cited Registration there are none], [the] goods ... are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). Applicant, however, presented evidence and argument attempting to show that “office furniture companies typically do not also sell [n]on-[o]ffice [m]ailboxes.”⁴ This is irrelevant. Under the third *DuPont* factor, we must base our determination regarding the similarities or dissimilarities between channels of trade and classes of purchasers for the goods as they are identified in the Application at issue and the cited Registration. *Octocom Sys.*, 16 USPQ2d at 1787; *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987).

The presumed overlap in trade channels and prospective customers weighs in favor of a finding that confusion is likely.

B. Similarity or Dissimilarity of the Marks

1. Strength of the cited BUILT TO INSPIRE Mark

Before we evaluate the similarity or dissimilarity of the respective marks, we consider the strength of the cited BUILT TO INSPIRE mark. The strength of Registrant’s mark affects the scope of protection to which it is entitled. Thus, we consider the conceptual strength of Registrant’s mark, based on the nature of the mark itself, and its commercial strength, based on marketplace recognition of the mark. *See In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed.

⁴ Applicant’s Brief, 6 TTABVUE 8, 11, 17-18; Applicant’s Reply Brief, 9 TTABVUE 3; Request for Reconsideration of October 17, 2022, at TSDR 16-21, 196-207.

Cir. 2010) (“A mark’s strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength”). The commercial strength of the mark also is affected by the number and nature of third-party uses of similar marks for similar goods. *DuPont*, 177 USPQ at 567.

Because the BUILT TO INSPIRE mark is registered on the Principal Register without a claim of acquired distinctiveness, the mark is presumed to be inherently distinctive. *Tea Bd. of India v. The Rep. of Tea, Inc.*, 80 USPQ2d 1881, 1899 (TTAB 2006) (“A mark that is registered on the Principal Register is entitled to all [Trademark Act] Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the goods.”).

Applicant does not per se argue that the BUILT TO INSPIRE mark as a whole is weak. Rather, Applicant’s “weakness” argument is confined to the term “BUILT” within Registrant’s mark. Applicant states:

The word BUILT when used in connection with the Registrant’s goods in Class 20 is weak because many third parties **use** the element BUILT in marks for furniture.

Sixty-two use-based **registrations** for trademarks containing the word BUILT as an element for goods in Class 20 co-exist on the USPTO register. ... The Applicant noted the vast number of co-existing third-party marks in Class 20 in its office action response. The Examining Attorney refused to consider how crowded the USPTO registry is for the term BUILT in connection with office furniture. Rather, the Examining Attorney stated that because “applicant’s goods specifically exclude office products ... showing that the mark is dilute(d) (sic) for office products is immaterial.” ... The Examiner missed the point. The REGISTRANT is using the mark for office furniture, which is a category of products that fall under “office products”. Its use is co-existing with multiple (at least 62 use-based registrations) third party **uses** of the

term BUILT with office products. For that reason – because the Registrant’s mark coexists already with numerous BUILT-formative marks **used** with the Registrant’s same type of goods – office products, the USPTO should allow the applicant’s mark – which is not used with office products – to co-exist. Stated another way, customers seeking 1) office mailboxes and 2) non-office mailboxes are accustomed to noting “minute distinctions” in trademarks incorporating the term BUILT for Class 20 goods.⁵

Applicant’s above-quoted arguments incorporate a number of misconceptions regarding trademark law and prosecution practice that we must rectify. To begin, Applicant is under the misperception that Registrant’s “non-metal mailboxes,” as identified in the cited Registration, comprise items that are a sub-category under the broader category of “office furniture.”⁶ This is incorrect. For the reader’s convenience, we repeat here the entirety of Registrant’s goods identified in International Class 20:

Office furniture, namely, lecterns; table dividers; non-metal mailboxes; cabinets, and storage cabinets, furniture cabinets; tack boards; display boards; track systems consisting of tracks and rollers for cabinet drawers, being parts of cabinets

As identified in the Registration, “non-metal mailboxes” are set off from the other goods in Class 20 by semi-colons. Applicant’s argument that Registrant’s non-metal mailboxes are a sub-category under office furniture places restrictions into Registrant’s identification of goods that simply are not there. An appropriate understanding of Registrant’s relevant goods is significant to our evaluation of Applicant’s third-party registration evidence made of record, as we discuss later in this opinion.

⁵ Applicant’s Brief, 6 TTABVUE 15-17 (emphasis added).

⁶ Applicant doubled-down on this position in its Reply Brief, 9 TTABVUE 3-4.

Proper punctuation in identifications of goods is necessary to delineate explicitly each product within a list so as to avoid ambiguity. The conventions of the USPTO are that semicolons separate distinct items in a list, and any prefatory language applies only to the items following the prefatory language that are separated by commas. Commas are used in an identification: (1) to separate a series of related items identified within a particular category of goods or services, (2) before and after “namely,” and (3) between each item in a list of goods or services following “namely” (e.g., personal care products, namely, body lotion, bar soap, shampoo). Semicolons are used to separate a series of distinct categories of goods or services within an international class (e.g., personal care products, namely, body lotion; deodorizers for pets; glass cleaners). *See* Trademark Act Sections 1(a)(2), (b)(2), 15 U.S.C. §§ 1051(a)(2), (b)(2); Trademark Rule 2.32(a)(6), 37 C.F.R. § 2.32(a)(6); TRADEMARK MANUAL OF EXAMINING PROCEDURE (TMPEP) §1402.01(a) (July 2022); *see also In re Midwest Gaming & Entm’t LLC*, 106 USPQ2d 1163, 1166 (TTAB 2013) (finding that, because a semicolon separated the two relevant clauses in registrant’s identification, its “restaurant and bar services” is a discrete category of services that stands alone and independently as a basis for likelihood-of-confusion analysis, and is not connected to nor dependent on the services set out on the other side of the semicolon). Consequently, “non-metal mailboxes” is a discrete category of goods that stands alone and independently as a basis for our likelihood-of-confusion analysis, and is not connected to nor dependent on any of the goods set out on the other sides of the semicolons within Class 20 of the cited Registration.

Next, Applicant conflates evidence of third-party **registration** evidence that the Board typically considers to show the conceptual weakness of a cited mark (which Applicant did provide), *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (“[T]hird-party registration evidence that does not equate to proof of third-party use may bear on conceptual weakness if a term is commonly registered for similar goods or services.”), with third-party **use** evidence that the Board typically considers to show the commercial weakness of the mark (which Applicant did not provide), *In re FabFitFun*, 127 USPQ2d 1670, 1674 (TTAB 2018) (“Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.”) (quoting *Palm Bay Imps., Inc. v Veuve Cliquot Ponsardin Maison Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1693 (Fed. Cir. 2005)).

Between its two communications with the USPTO, not counting the cited Registration (which Applicant also included), Applicant made of record a total of 45 non-duplicative third-party registrations for marks including the term “BILT” or “BUILT.”⁷ Of these 45 registrations, we do not consider six of them because they were cancelled⁸ – bringing the potentially relevant total down to 39. Of these 39 active

⁷ Office Action Response of April 14, 2022, at TSDR 17-20; Request for Reconsideration of October 17, 2022, at TSDR 87-195.

⁸ Cancelled registrations: Reg. Nos. 4848142, 2614814, 4155213, 4163294, 4134394 and 4240233. Office Action Response of April 14, 2022, at TSDR 17-18; Request for Reconsideration of October 17, 2022, at TSDR 101-02, 112-17, 122-24. A cancelled or expired registration is not evidence of any presently existing rights in the mark shown or that the registrant ever used the mark. *Monster Energy Co. v. Lo*, 2023 USPQ2d 87, at *4 n.5 (TTAB 2023).

third-party registrations, none of them are relevant for the purpose Applicant submitted them.

Below is a sample of the 39 active, non-duplicative third-party registrations for marks including the term BILT or BUILT that Applicant made of record:⁹

Mark	Reg. No.	Goods
HENRYBUILT	4995877	Kitchen organization and storage systems comprising primarily of custom designed and built cabinets, wall units, non-metal tile and wood backsplashes, and made to order mobile and stationary islands, sold as a unit; Storage systems comprising primarily of made to order shelving, drawers, internally organized drawers, cupboards, non-metal bins for bathroom vanities, wardrobes, media centers, office and general storage, sold as a unit; Furniture, in Cl. 20.
 [BENNETT BILT]	1340764	Metal waste receptacles for commercial use and cabinets, in Cl. 20.
 [BUILT BETTER BY DESIGN EPOCH DESIGN, INC.]	2738084	Furniture; non-metal ladders, in Cl. 20.
TOUGHBUILT	4245675	Plastic storage containers for commercial or industrial use, in Cl. 20.
BUILT FOR LIFE OUTDOORS	4522744	Chairs, in Cl. 20.

As represented by the sample above, the third-party marks Applicant made of record are registered for goods other than, and unrelated to, Registrant's relevant

⁹ Applicant made Reg. No. 4995877 of record with its Office Action Response of April 14, 2022, at TSDR 19-20. Applicant made Reg. Nos. 1340764, 2738084 with its Request for Reconsideration of October 17, 2022, at TSDR 87-88, 99-100.

goods (non-metal mailboxes), and thus have little or no probative value in showing the conceptual weakness of the term “BUILT” within Registrant’s BUILT TO INSPIRE mark. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1751 (Fed. Cir. 2017); *Made in Nature*, 2022 USPQ2d 557, at *24.

The other evidence of record we consider regarding conceptual weakness, which the Examining Attorney and Applicant provided for other purposes (that is, to show the meaning and commercial impression of the respective marks), consists of dictionary definitions. “[A] term found in the dictionary and one that has a well[-]known meaning to the average person, ... might suggest that it is a ‘weak’ mark when used in its literal or related meanings.” *Valley Bank and Trust Co. v. Bankers Trust of S. Ca., N.A.*, 201 USPQ 888, 893 (TTAB 1979)).

The Examining Attorney made the following dictionary definitions of record:

- BUILT – the past tense and past participle of build.¹⁰
- BUILD – to make a machine, vehicle, or other structure by putting its parts together.¹¹

Applicant made the following relevant dictionary and non-dictionary definitions of record:

- BUILD – to make something by putting bricks or other materials together; the size and shape of a person’s body; the way a product such as a vehicle or piece of equipment has been made, including qualities such as how strong it seems

¹⁰ BUILT, MACMILLAN dictionary, [macmillandictionary.com/dictionary/American/built_2](https://www.macmillandictionary.com/dictionary/American/built_2), definition at Office Action of October 17, 2021, at TSDR 8.

¹¹ BUILD, MACMILLAN dictionary, [macmillandictionary.com/dictionary/American/build_1](https://www.macmillandictionary.com/dictionary/American/build_1), definition at Office Action of October 17, 2021, at TSDR 9.

and how it looks; to make a structure or something else by putting materials together in a particular way; the particular form of someone's body.¹²

- BUILT – used for describing the size and shape of someone's body; used for showing where a machine or structure was produced or made.¹³
- BUILT – past tense and past participle of build; having a specified physique; informal, having a well-developed or attractive body.¹⁴
- BUILT – past and past participle of build; (of a person) having a specified physical size or build.¹⁵
- BILT – to develop the muscles over your body to to [sic] point where they are ripped 24 hours a day; a way of describing someone who is rather large, or big- In a none [sic] negative way; BILT should be used in context with muscles.¹⁶

Based on the above definitions, and within the context of considering Registrant's

BUILT TO INSPIRE mark in connection with Registrant's identified goods, we find

¹² BUILD, CAMBRIDGE English Dictionary, https://dictionary.cambridge.org/dictionary/english/build?q=build_1, definition at Office Action Response of April 14, 2022, at TSDR 23-37.

¹³ BUILT, MACMILLAN dictionary, [macmillandictionary.com/dictionary/American/built_1](https://www.macmillandictionary.com/dictionary/American/built_1), definition at Office Action Response of April 14, 2022, at TSDR 38.

¹⁴ BUILT, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, <https://www.ahdictionary.com/word/search.html?q=build>, definition at Office Action Response of April 14, 2022, at TSDR 41.

¹⁵ BUILT, LEXICO.COM, <https://www.lexico.com/en/definition/built>, definition at Office Action Response of April 14, 2022, at TSDR 43.

¹⁶ While Applicant says this definition of BILT comes from the URBAN DICTIONARY, Office Action Response of April 14, 2022, at TSDR 14, 16, Applicant did not provide the URL for this online reference nor its web page capture date, and there is no other indicia on the submitted web page that this definition came from the URBAN DICTIONARY. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1733 (TTAB 2018) (The Board will not “consider Internet evidence filed by an applicant in an ex parte proceeding to be properly of record unless the URL and access or print date has been identified, either directly on the webpage itself, or by providing this information in a response, except where the examining attorney does not object.”). Applicant discussed this definition of BILT in its brief, 6 TTABVUE 7, but the Examining Attorney did not discuss any of the dictionary evidence made of record, nor object to it whatsoever. Also, Applicant made of record the URBAN DICTIONARY definition of BILT at a point during prosecution that the Examining Attorney had an opportunity to rebut this evidence by submitting other definitions which could have called into question the accuracy of Applicant's URBAN DICTIONARY definition. *In re Lizzo LLC*, 2023 USPQ2d 139, at *10 (TTAB 2023). Since the Examining Attorney did not object to the URBAN DICTIONARY evidence, and had the opportunity to rebut it with other evidence, we will consider it for whatever probative value it may have.

the term “BUILT” to mean how or the manner in which Registrant’s identified goods were made, or alternatively to mean strength by the manner of construction. These are well-known meanings of the dictionary term “BUILT” to the average person, suggesting it is a weak term used in its literal sense or by its related meaning. *Valley Bank and Trust*, 201 USPQ at 893.¹⁷ On the other hand, we are mindful that “even suggestive or weak marks are entitled to protection from the use of ... similar mark[s] for legally identical ... [goods].” *In re Max Cap. Grp. Ltd.*, , 93 U.S.P.Q.2d 1243, 1246 (TTAB 2010).

As to commercial strength, in an ex parte appeal such as this one the owner of the cited registration is not a party, and the Examining Attorney was under no obligation to demonstrate consumers’ exposure to or recognition of the cited mark in the marketplace. *In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016). So, the mark’s commercial strength, as usual, is treated as neutral. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1086 (TTAB 2016). As we noted above, Applicant did not provide any third-party use evidence that might lessen the commercial strength of Registrant’s BUILT TO INSPIRE mark, or the term “BUILT” within Registrant’s mark.

In sum, we find the cited BUILT TO INSPIRE mark as a whole to be inherently distinctive, with commercial strength being a neutral consideration. Applicant failed to provide sufficient probative evidence of the conceptual or commercial weakness of

¹⁷ This does not mean, however, that Registrant’s BUILT TO INSPIRE mark in its entirety is weak; given Applicant did not provide any evidence demonstrating the weakness of Registrant’s mark as a whole.

Registrant's mark as a whole. On the other hand, we find the term BUILT within Registrant's mark to be conceptually weak.

2. Comparison of the BUILT TO INSPIRE and BILT Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, considering their appearance, sound, meaning and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic*, 128 USPQ2d at 1048. "Similarity in any one of these elements may be sufficient to find the marks confusingly similar." *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff'd mem.*, 777 F. App'x 516 (Fed. Cir. 2019). In this connection, by "commercial impression" we mean "what the probable impact will be on the ordinary purchaser in the market place" *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972). Moreover, where, as here, the goods of Applicant and Registrant are legally identical, the degree of similarity between the marks required to support a finding that confusion is likely declines. *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (citing *In re Viterra*, 101 USPQ2d at 1908)).

The test is not whether the marks can be distinguished in a side-by-side comparison, but rather whether the marks are sufficiently similar in terms of their overall commercial impression that confusion as to the source of the goods offered under the respective marks is likely to result. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). The parties' marks "must be considered ... in light of the fallibility of memory" *In*

re St. Helena Hosp., 774 F.3d 747, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *San Fernando Elec. Mfg. Co. v. JFD Elecs. Components Corp.*, 565 F.2d 683, 196 USPQ 1 (CCPA 1977)). Therefore, the focus is on the recollection of the average consumer – here, the purchaser of non-metal mailboxes – who normally retains a general rather than a specific impression of trademarks. *In re Assoc. of the U.S. Army*, 85 USPQ2d 1264, 1268 (TTAB 2007); *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106, 108 (TTAB 1975).

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat'l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). Further, “[n]o element of a mark is ignored simply because it is less dominant, or would not have trademark significance if used alone.” *In re Electrolyte Labs. Inc.*, 913 F.2d 930, 16 USPQ2d 1239, 1240 (Fed. Cir. 1990) (citing *Spice Islands, Inc. v. Frank Tea & Spice Co.*, 505 F.2d 1293, 184 USPQ 35 (CCPA 1974)).

On the other hand, different features may be analyzed to determine whether the marks are similar. *Price Candy Co. v. Gold Medal Candy Corp.*, 220 F.2d 759, 105 USPQ 266, 268 (CCPA 1955). That is, more or less weight may be given to a

particular feature of a mark, however, provided the ultimate conclusion rests on a consideration of the marks in their entireties. *Stone Lion*, 110 USPQ2d at 1161.

In this connection, we find BUILT is the dominant portion of Registrant's mark, as it is the first term in the mark. *See Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“[I]t is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered”); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992) (upon encountering the marks, consumers will first notice the identical lead word). Moreover, BILT is the only term in Applicant's mark. We further find that the words BUILT and BILT sound identical, and Applicant does not argue otherwise.

Appearance and Sound: As to these elements, Applicant argues that (i) “[t]he marks BILT and BUILT TO INSPIRE are notably different in appearance [because] [t]he very short single syllabic word BILT and the four syllable phrase BUILT TO INSPIRE do not look similar, especially in light of the spelling of the word BILT and the word BUILT[;] [m]oreover, the Registrant's mark is notably changed by the addition of the unique word INSPIRE[.]” and (ii) “[l]inguistically, the marks BUILT TO INSPIRE and BILT are distinguishable because they have different stress patterns, structure, and different dominant acoustic features [; thus,] ...[t]he marks do not sound similar because they have different dominant acoustic features and lengths.”¹⁸

¹⁸ Applicant's Brief, 6 TTABVUE 14.

The problem we have with these arguments is that a determination of likelihood of confusion is not made on a purely mechanical basis, counting the number of words, syllables or even letters that are similar or different. *See In re John Scarne Games, Inc.*, 120 USPQ 315, 316 (TTAB 1959) (“Purchasers of game boards do not engage in trademark syllable counting[;] they are governed by general impressions made by appearance or sound, or both.”). Rather, “in articulating reasons for reaching a conclusion on the issue of likelihood of confusion ..., for rational reasons[] more or less weight ... [is] given to ... particular feature[s] of ... [the] marks ... [on the way toward coming to] the ultimate conclusion [that] rests on a consideration of the marks in their entirety.” *In re Nat’l Data*, 224 USPQ at 751.

Overall, we find that the marks BUILT TO INSPIRE and BILT appear and sound more similar than different. “In saying this, we ... keep in mind the penchant of consumers to shorten marks.” *In re Bay State Brewing Co., Inc.*, 117 U.S.P.Q.2d 1958, 1961 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 219 (CCPA 1978) (Rich, J., concurring: “the users of language have a universal habit of shortening full names — from haste or laziness or just economy of words.”)). Simply, “the presence of ... additional term[s] in ... [Registrant’s] mark does not necessarily eliminate the likelihood of confusion ... [when the dominant] terms are identical [at least in sound].” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1260 (Fed. Cir. 2010).

Meaning and Commercial Impression: Before comparing the meaning and commercial impression of the marks, we first must include a final dictionary term not made of record by either Applicant or the Examining Attorney:

- INSPIRE – to spur on; impel, motivate; to exert an animating, enlivening, or exalting influence on; affect; to influence, move, or guide by divine or supernatural inspiration; to bring about, occasion, incite; to draw forth or bring out.¹⁹

As to the meaning and commercial impression elements of comparison, Applicant argues:

Registrant’s [m]ark uses the phrase BUILT TO INSPIRE, with the word BUILT to mean “the process of putting together materials to create a new product.” This combination of words and specific use of “inspire” connotes the characteristics of beauty and lightness. Whereas, the Applicant’s mark – due to its spelling and meaning – connotes strength and heft. The meaning of the two marks are distinct and neither mark connotes the characteristics of the other’s mark. Thus, the commercial impression of the marks are distinct.²⁰

In response, the Examining Attorney argues:

[As to] the words “BUILT” and “BILT”[,] ... consumers would interpret th[is] wording to have the same meaning. Consumers are not likely to ascribe a meaning to “BILT” that goes beyond the meaning of “BUILT”. The “TO INSPIRE” portion of [R]egistrant’s mark conveys meaning about why the objects were created. Here, [A]pplicant’s mark contains the phonetic equivalent of the first, and dominant, word in the [R]egistrant’s mark and omits the “why” portion of the [R]egistrant’s mark. The omission of this portion of the [R]egistrant’s mark means that, to prospective purchasers, [A]pplicant’s mark may appear as a shortened form of [R]egistrant’s mark conveying the “what” without the “why.”

¹⁹ INSPIRE, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/inspire> (last visited, June 22, 2023). The Board may take judicial notice of dictionary definitions from online sources when the definitions themselves are derived from dictionaries that exist in printed form or have regular fixed editions. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

²⁰ Applicant’s Brief, 6 TTABVUE 14-15.

The evidence of record supports the Examining Attorney's interpretation over Applicant's interpretation of the two marks. According to the very dictionary definitions provided by Applicant, the terms "BUILT" and "BILT" both have the connotation of strength (whether that is strength by construction or bodily strength). There is no evidence of record supporting Applicant's contention that the use of "INSPIRE" in Registrant's mark connotes the characteristics of beauty and lightness. According to Applicant's dictionary evidence for the terms "BUILT" and "BILT", and the definition of "INSPIRE" for which we take judicial notice, to consumers Registrant's mark could be interpreted to mean "strength to spur one on or to guide," whereas Applicant's mark simply could be interpreted to mean "strength." These are reasons to buy non-metal mailboxes, whether they originate from Registrant or Applicant. The likely confusion between the marks, as associated with legally identical goods, is manifest.

The similarity between the marks as a whole, the first *DuPont* factor, weighs in favor a finding that confusion is likely.

II. Likelihood of Confusion: Balancing the Factors

Weighing the *DuPont* factors for which there has been evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at *7 (Fed. Cir. 2023), Applicant's and Registrant's goods are legally identical. Consequently, the trade channels in which the respective goods would travel, and prospective customers therefor, are presumed to overlap. The cited BUILT TO INSPIRE mark as a whole is inherently distinctive, with commercial strength being a neutral consideration. However, the term BUILT within Registrant's mark is

conceptually weak. Notwithstanding, Registrant's mark is afforded a sufficient scope of protection as against a similar mark sought for registration in connection with legally identical goods. Thus, based on the elements of appearance, sound, meaning and commercial impression, the marks BUILT TO INSPIRE and BILT are more similar than they are different. Weighing these factors, they support a finding that confusion is likely. On balance, we find confusion is likely between Applicant's and Registrant's marks for the identified goods.

Decision:

The refusal to register Applicant's INSPIRE mark on the ground of likelihood of confusion under Trademark Act Section 2(d) is affirmed.